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Supreme Court, U.S.
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No. 98-480

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

COMM-CARE CORPORATION

Petitioner,

v.

LOUISIANA TAX COMMISSION, et al.

Respondents.

ON PETITION OF WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Honorable Court consider a due process issue not pled in the state district court below and not considered by any of the lower courts?

2. Can a state require a taxpayer to pay its taxes timely in order to preserve its right to challenge an assessment?

3. Does an independent legal basis support the lower courts' decisions?

PARTIES REPRESENTED

This Opposition to Petition for Writ of Certiorari is filed on behalf of the following respondents: Rich Bailey, in his capacity as Assessor of Ouachita Parish; Bobby L. Cudd, in his capacity as Assessor of Beauregard Parish; Gerald McCrory, Jr., in his capacity as Assessor of Ascension Parish; Lee J. Thevenot, in his capacity as Assessor of Avoyelles Parish; Eugene W. Cavanaugh, in his capacity as Assessor of Vernon Parish; Ralph R. Gill, in his capacity as Assessor for Rapides Parish Tax Assessor; Jewette Farley, in his capacity as Assessor of Lincoln Parish; Carmon F. Walker, in his capacity as Assessor of Catahoula Parish; and, Frank Granger III, in his capacity as Assessor of East Baton Rouge Parish.

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Rules

U.S.Supreme Court Rule 15.2

STATEMENT OF THE CASE

During 1995, petitioner, Comm-Care Corporation ("Comm-Care") took action to challenge the legality of 1995 assessments of ad valorem taxes by respondents, the Assessors[1], on ten of Comm-Care's nursing home facilities. This action included a complaint to the local board of review and a subsequent appeal to the Louisiana Tax Commission. No injunction or stay was issued with regard to the December 31, 1995 due date for the payment of the property taxes for 1995.

The Louisiana Tax Commission found on February 13, 1996 that Comm-Care was operating the ten nursing homes "for profit" and that the property was consequently not exempt from ad valorem taxation. On the same day, Comm-Care paid the taxes in question under protest, forty-four (44) days after the

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[1] For convenience, "Assessors" will be used herein to refer collectively to the following respondents: Rich Bailey, in his capacity as Assessor of Ouachita Parish; Bobby L. Cudd, in his capacity as Assessor of Beauregard Parish; Gerald McCrory, Jr., in his capacity as Assessor of Ascension Parish; Lee J. Thevenot, in his capacity as Assessor of Avoyelles Parish; Eugene W. Cavanaugh, in his capacity as Assessor of Vernon Parish; Ralph R. Gill, in his capacity as Assessor for Rapides Parish Tax Assessor; Jewette Farley, in his capacity as Assessor of Lincoln Parish; Carmon F. Walker, in his capacity as Assessor of Catahoula Parish; and, Frank Granger III, in his capacity as Assessor of East Baton Rouge Parish.

taxes were due. On February 27, 1996, Comm-Care filed its petition for judicial review in the state district court. (See Assessors' Appendix, pp. A-17, et seq.).

On October 9, 1996, the state district court sustained an exception of prescription that had been filed on behalf of the Assessors. Comm-Care opposed the Assessors' exception, but did not raise any due process issue. (See Assessors' Appendix, pp. A-35 et seq.). In sustaining the exception of prescription, the state district court held that further review of the decisions of the local board of review and the Louisiana Tax Commission was precluded by Comm-Care's failure to pay its taxes when due on December 31, 1995.

Comm-Care appealed to the Louisiana First Circuit Court of Appeals, which found no error in the judgment of the district court. The state court of appeals declined to decide whether the state district court's judgment was supported by the exception of prescription or instead by an exception of no cause of action that had also been filed by the Assessors. (See Comm-Care's Appendix, pp. A-12 to A-16). Both exceptions were based, at least in part, on Comm-Care's failure to pay its taxes timely. (See Assessors' Appendix, pp. A-25 to A-27, A-28 to A-34). Comm-Care first urged the due process issue to the state court of appeals. (See Petition for Writ of Certiorari

[hereinafter sometimes "U.S. Pet. for Writ"], p. ii ¶1). The state court of appeals did not consider the due process issue. The Louisiana Supreme Court denied Comm-Care's request for a writ of certiorari to the state court of appeals and also did not consider the due process issue. (U.S. Pet. for Writ, p.ii ¶2).

Comm-Care's Statement of the Case contains a discussion of Louisiana jurisprudence which the Assessors believe should have instead been included in the Argument portion of the Petition for Writ of Certiorari. In an effort to comply with U.S. Supreme Court Rule 15.2, the Assessors respectfully show that Comm-Care's Statement of the Case mischaracterizes the current status of Louisiana jurisprudence. The Louisiana Supreme Court granted writs of certiorari as to the conflicting opinions of two state courts of appeals referred to by Comm-Care[2] and the conflict was resolved in Comm-Care Corp. v. Bishop, 696 So.2d 969 (La. 7/1/97), *reh'g granted* Comm-Care Corp. v. Bishop, 706 So.2d 425 (La. 1/21/98). The initial opinion of the Louisiana Supreme Court followed the reasoning of the First Circuit Court of Appeals in

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[2] See Comm-Care Corp. v. Louisiana Tax Commission, 681 So.2d 1001 (La.App. 1 Cir, 9/27/96), and Comm-Care Corp. v. Bishop, 673 So.2d 212 (La.App. 3 Cir. 3/6/96). These cases were discussed by Comm-Care at pages 3 and 5 of its Petition for Writ of Certiorari.

holding against Comm-Care. Comm-Care Corp. v. Bishop, 696 So.2d at 974. On rehearing, the Louisiana Supreme Court held that the issue discussed in its original opinion was moot, but held that a different legal basis supported the same result.

ARGUMENT

Comm-Care's Petition for Writ of Certiorari is simply an attempt to rectify its failure to avail itself of the clear and certain remedy provided to aggrieved taxpayers by Louisiana law.

I. The Due Process Issue Was Not Timely Raised.

A constitutional issue not properly raised in or passed on by the lower courts should not be considered by this Honorable Court. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Adler v. New York Bd. of Educ., 342 U.S. 485, 496 (1952); Korematsu v. U.S., 323 U.S. 214, 222 (1944). Federal law and Louisiana law presume that statutes are constitutional. Arizonans for Official English v. Ariz., 520 U.S. 43 (1997); Chamberlain v. DOTD, 624 So.2d 874, 879 (La. 1993); Moore v. RLCC Tech., Inc., 668 So.2d 1135, 1140 (La. 2/28/96). A party challenging the validity of a statute on constitutional grounds in Louisiana has the burden of proving its

invalidity. Moore v. Roemer, 567 So.2d 75, 78 (La. 1990). This burden requires that the challenging party file a plea of unconstitutionality in the trial court and outline with particularity the basis of the purported unconstitutionality. Williams v. Dept. of Health & Hosp., 671 So.2d 899, 901-2 (La. 1/20/96).

No plea of unconstitutionality was filed in the state district court by Comm-Care in this matter.[3] While Comm-Care attempted to raise the due process issue in its brief to the state court of appeals, the court did not pass on the merits of the due process issue.[4] The Louisiana Supreme Court also did not consider the due process issue.[5]

Since the district court pleadings contain no plea of unconstitutionality and since the intermediate courts did not consider the due process issue now asserted by Comm-Care, this issue has not been properly placed before this Honorable Court. Accordingly, Comm-Care's Petition for Writ of Certiorari should be denied.

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[3] See U.S. Pet. for Writ, p. ii; See also Assessors' Appendix at pp. A-17, et seq., and pp. A-35, et seq.

[4] See Comm-Care's Appendix at pp. A-49 to A-52, pp. A-12 to A-16; and see U.S. Pet. for Writ, at p. ii, ¶1.

[5] See Comm-Care's Appendix at p. A-17; and see U.S. Pet. for Writ, at pp. ii, ¶2.

II. Any Required Due Process Was Afforded to Comm-Care.

A. U.S. Constitutional Due Process Requirements Are Flexible And May Be Satisfied By Pre-deprivation or Post-deprivation Remedies.

States are allowed to require a taxpayer to promptly pay a tax when due. The Due Process Clause of the Fourteenth Amendment of the United States Constitution simply obligates such a state to provide meaningful post-deprivation relief to remedy any unconstitutional tax collected. McKesson v. Div. of Alc. Bev., 496 U.S. 18, 39 (1990).

In non-tax contexts, the Due Process Clause requires relief prior to any deprivation of property. Id., 496 U.S. at 37, *citing* Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 542 (1985). In the exaction of taxes, however, it is well-established that a pre-deprivation remedy is not required. McKesson, 496 U.S. at 37. Instead, the requirements of the Due Process Clause may also be satisfied by a post-deprivation remedy. A post-deprivation remedy which requires the timely payment of taxes is allowed because of the government's "exceedingly strong interest in financial stability". Id.

Due process is a flexible concept and its procedural requirements depend

upon the demands of each particular situation. Matthews v. Eldridge, 424 U.S. 319, 334 (1976), *and cases cited therein*. Louisiana's procedure for challenging the legality of an assessment affords taxpayers notice and a meaningful opportunity to be heard that is more than adequate under the circumstances.

B. Louisiana Has Two Procedures for Challenges to Assessments.

1. Louisiana distinguishes between "Legality" and "Correctness" challenges.

Louisiana constitutional and statutory law provides for two distinct procedures for challenging an ad valorem tax assessment. The applicability of each procedure in a particular case depends upon the nature of the challenge asserted by the taxpayer.

Louisiana courts recognize a distinction between "correctness" and "legality" challenges. Triangle Marine, Inc. v. Savoie, 681 So.2d 937, 939-40 (La. 10/15/96). Correctness challenges are those seeking adjustments to the valuation of taxable property. Id. at 940.[6] In contrast, legality challenges are directed at claims that the

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[6] See also Abraham v. Carter, 580 So.2d 485, 487 (La.App. 4 Cir. 1991); Westminster Mgmt. Corp. v. Mitchell, 525 So.2d 1171 (La.App. 4 Cir. 1988), *cert. denied* 489 U.S. 1018 (1989); Lowrey Chevrolet, Inc. v. Brumley, 510 So.2d 1294 (La.App. 3 Cir. 1987).

assessment is void or inherently invalid. Id. A challenge to the validity of a tax on exempt property is a legality challenge, not a correctness challenge. Id.

A correctness challenge to an assessment must follow the procedure contained in Louisiana Revised Statutes § 47:1989-1998. Triangle Marine, 681 So.2d at 939-40.[7] The pre-deprivation remedy created by these statutes includes administrative[8] procedures and judicial review[9] mandated by La. Const. art. 7, § 18(E).[10]

On the other hand, legality challenges are properly made pursuant to Louisiana Revised Statute § 47:2110,[11] a post-deprivation remedy. Triangle Marine, 681 So.2d at 941, *and cases cited therein*. In the present case, Comm-Care erroneously pursued the pre-deprivation administrative procedures provided for in R.S. § 47:1989-1998 for correctness challenges only. The Assessors excepted to the use of the improper procedure in state district court. (See Assessors' Appendix, p. A-26 ¶2, p. A-27 ¶4). The Assessors repeated their opposition to the use of the improper procedure in both appellate

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[7] See also Abraham, 580 So.2d at 487.

[8] La.R.S. § 47:1989, 1992 & 1997. See Assessors' Appendix at pp. A-3 to A-4, A-14.

[9] La.R.S. § 47:1998. See Comm-Care's Appendix at pp. A-29 to A-31 for the text of this statute.

[10] See Assessors' Appendix at p. A-1.

[11] See Comm-Care's Appendix at pp. A-18 to A-20 for the text of La.R.S. § 2110.

courts. (See Assessors' Appendix, pp. A-50, A-72 to A-73). Because a challenge to the validity of a tax on exempt property is a legality challenge, the proper procedure would have been the post-deprivation procedure contained in R.S. § 47:2110.[12]

2. Comm-Care failed to comply with either Louisiana procedure.

Ad valorem taxes are due in Louisiana on December 31. La.R.S. § 47:2101.A.(1).[13] The filing of a challenge to an assessment does not delay the December 31 due date. In fact, R.S. § 47:2110.A provides, in part, that "[n]o court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax. . .".[14] Thus, a challenge to an assessment cannot alleviate the necessity of the payment of taxes by December 31.

Louisiana R.S. § 47:2110 requires that a taxpayer pay, under protest, the taxes due by December 31 and then institute an action to recover said taxes in a district court within thirty

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[12] For the prior tax year, Comm-Care had attempted to pursue a remedy under R.S. § 47:2110, but failed to state a cause of action under that statute. Comm-Care Corp. v. Bishop, 706 So.2d 425, 427 (La. 1/21/98). It is not clear why this procedure was abandoned by Comm-Care for the 1995 tax year.

[13] See Comm-Care's Appendix at p. A-21.

[14] See Comm-Care's Appendix at p. A-18.

(30) days of payment. Capital Drilling Co. v. Graves, 496 So.2d 487, 491 (La.App. 1 Cir. 1986).[15] The court in Capital Drilling opined that a challenge to an assessment pursuant to R.S. § 47:1998 would also be contingent upon the timely payment of taxes under protest. Capital Drilling, 496 So.2d at 492.

Comm-Care argued in the lower courts that it could not pay its taxes timely without divesting the Louisiana Tax Commission of jurisdiction.[16] While this argument has apparently been abandoned, it ignored the fact that the proper procedure for Comm-Care's legality challenge was under R.S. § 47:2110, not §§ 47:1989-1998. Further, a Louisiana court of appeals has held that a taxpayer who properly initiated a correctness challenge under R.S. §§ 47:1989, *et seq.*, was not foreclosed from continuing under those procedural statutes because it paid its taxes when due. Rickey Tri-Key Partnership v. Dupleix, 462 So.2d 235, 237 (La.App. 3 Cir. 1984).

Public policy strongly supports the requirement of timely payment of taxes

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[15] As to Comm-Care's 1994 taxes, the Louisiana Supreme Court followed Capital Drilling in its original opinion in Comm-Care v. Bishop, 696 So.2d at 974, before deciding on rehearing that those consolidated cases should be dismissed on a different basis in Comm-Care v. Bishop, 706 So.2d 425.

[16] See Comm-Care's Appendix at pp. A-48 to A-49, A-75.

to preserve the right to litigate the validity of a tax in court. Id. This Honorable Court has recognized that "[a]llowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls . . . and by making the ultimate collection of validly imposed taxes more difficult." McKesson, 496 U.S. at 37; See also Atchison, Topeka & Santa Fe R. Co. v. O'Connor, 223 U.S. 280 (1912).

Taxes owed for the 1995 tax year were not paid by Comm-Care until February 13, 1996, forty four (44) days after they had become delinquent. The state district court correctly held below that Comm-Care's petition for judicial review was untimely because the taxes were not paid when due.[17] The failure to pay the taxes when due precluded any possibility of compliance with R.S. § 47:1998 or R.S. § 47:2110. Thus, while Comm-Care's legality challenge to the assessment should have been brought under R.S. § 47:2110, the use of an improper procedure is immaterial because its failure to pay the ad valorem taxes when due would be fatal to any challenge to an assessment. Comm-Care did have the *opportunity* to avail itself of a clear and certain remedy.

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[17] See Comm-Care's Appendix at pp. A-10 to A-11.

3. Comm-Care Was Afforded Adequate Notice And A Meaningful Opportunity To Be Heard.

Louisiana's procedure for challenging the legality of an assessment pursuant to R.S. § 47:2110 provides a clear and certain remedy which comports with the requirements of due process. An action for this remedy may be brought within thirty days of the timely payment of taxes. This procedure was clear, certain, fair and available to Comm-Care in the present matter. Nonetheless, even though Comm-Care was familiar with the procedure provided by R.S. § 47:2110, Comm-Care chose not to employ this procedure as to its 1995 taxes.[18]

Furthermore, Comm-Care was actually given a hearing on their claim to the ad valorem tax exemption for 1995 before the Louisiana Tax Commission. While intended for correctness challenges only, this procedure and the judicial review provided for in R.S. § 47:1998 afforded Comm-Care a sufficient notice and opportunity to be heard. However, Comm-Care chose not to follow the requirements of the procedure for judicial review of the administrative procedures by refusing to pay its taxes when due.

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[18] Comm-Care had previously attempted to utilize the procedure provided for in R.S. § 47:2110 as to taxes for a prior year.

Like many states, Louisiana requires the timely payment of taxes to preserve the right to litigate a challenge to an assessment.[19] Comm-Care essentially argues that it was denied due process because it did not know that it was required to pay the ad valorem taxes by December 31. Comm-Care should not be excused from complying with the law because of its ignorance of the law. La.C.C. art. 5.[20] Thus, Comm-Care's failure to employ the proper procedure for challenging the legality of an assessment and its failure to pay its taxes on time are fatal to its claim.

Although Comm-Care has now asserted that it cannot be required to follow statutory requirements derived from interpreting R.S. § 47:1998 *in para materia* with other statutes, Comm-Care itself must have so interpreted R.S. § 47:1998 since Comm-Care's own petition for judicial review prays for relief pursuant to R.S. § 47:2110.A.[21] (See Assessors' Appendix, p. A-23). Comm-Care's argument is without merit.

The cases discussed by Comm-Care in its petition for writ do not support its position. The tax exacted in Carpenter v. Shaw, 280 U.S. 363 (1930), was in direct contravention of an agreement

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[19] See Capital Drilling, 496 So.2d at 491.

[20] "No one may avail himself of ignorance of the law." La.C.C. art. 5.

[21] Comm-Care's Petition for Judicial Review also expressly alleges that its claim is made pursuant to La.R.S. § 47:1998.A(1).

between the Choctaw Indian tribe and the federal government. The Choctaw had been compelled to pay an illegal tax under duress. Id. at 369. This Honorable court held therein that a state court could not deny the recovery of taxes which violated U.S. law or the U.S. Constitution. Id. The result would certainly be different where, as here, the tax does not violate U.S. law or the U.S. Constitution.

Similarly, the tax exacted in Reich v. Collins, 513 U.S. 106 (1994), violated the U.S. Constitution and, as in Carpenter, the state court had attempted to deny recovery of a tax which violated the laws or Constitution of the United States. Further, the "bait and switch" performed by Georgia in Reich does not exist in the present case. In Reich, the taxpayer paid the illegal taxes at a time when Georgia had what appeared to be a clear and certain post-deprivation remedy. The Georgia Supreme Court decided that this post-deprivation remedy did not exist as to the Reich taxpayer only after the taxes had been paid. The Georgia Supreme Court also held that Georgia's pre-deprivation procedures were constitutionally adequate, although the taxpayer in Reich could not utilize those procedures. As a consequence, the Reich taxpayer did not have a real opportunity to avail himself of the pre-deprivation procedure because the post-deprivation remedy appeared to exist

until it was too late for the taxpayer to use the pre-deprivation procedure. Id.

Comm-Care failed to identify any "bait" and any "switch" in the present matter. In fact, the two remedies available in Louisiana, particularly the one provided for legality challenges[22], provided a clear and certain remedy before December 31, 1995 and they continue to provide a clear and certain remedy today. Nonetheless, Comm-Care refused to follow either procedure. Comm-Care's Petition for Writ of Certiorari should be denied

III. The Lower Court's Decisions Are Supported By An Independent Legal Basis.

Constitutional questions should not be decided until necessary. Clinton v. Jones, 520 U.S. 681 (1997). This Honorable Court recognizes the "fundamental and long-standing principle of judicial restraint". Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 445-6 (1988). Judicial restraint and the avoidance of constitutional questions are particularly appropriate in "takings" cases. Pennell v. San Jose, 485 U.S. 1, 10 (1987). It should always be determined whether a statute can be reasonably construed so as to avoid the

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[22] La.R.S. § 47:2110.

constitutional question. Feltner v. Columbia Pictures Television, Inc., ____ U.S. _____, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998).

The principle of judicial restraint dictates that the decision of the lower courts in this matter remain undisturbed. The state court of appeals found no error in the state district court's judgment, but declined to decide whether the result should have been granted on the exception of prescription or the exception for failure to state a cause or right of action.[23] The Assessors contend that the exception of prescription was properly sustained by the state district court and that their exception of no cause of action was also a proper, independent basis for the action of the lower courts.

The Louisiana Code of Civil Procedure sets forth a system of fact pleading. La.C.C.P. arts. 854, 891, 1003, 1004[24]; Roberson v. Provident House, 576 So.2d 992, 994 (La. 1991). In order to state a cause of action, a petition must contain allegations of specific facts sufficient to support the claim. Lott v. Haley, 370 So.2d 521, 524-5 (La. 1979).

No cause of action can be stated in Louisiana on the basis of the unconstitutionality of a statute as applied in a particular case unless

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[23] Cite Comm-Care's Appendix at A-16.

[24] See Assessors' Appendix at pp. A-1 to A-2.

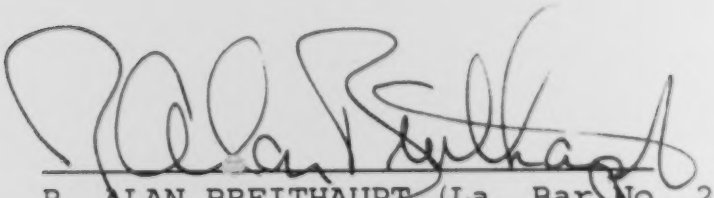
there is a plea specifying how the statute is unconstitutional. Williams v. Dept. of Health & Hospitals, 671 So.2d at 901-2. Likewise, an aggrieved taxpayer must allege facts sufficient to show compliance with any legal prerequisites to a suit to recover taxes. Williams v. Louisiana, 538 So.2d 193, 198 (La. 1989). As explained hereinabove, the appropriate procedure for Comm-Care's challenge to the legality of an assessment is provided for by R.S. § 47:2110, which requires payment of taxes by December 31. Comm-Care's petition for judicial review affirmatively alleges that it was seeking review pursuant to the wrong statute, i.e., R.S. § 47:1998. (See Assessors' Appendix, p. A-18 ¶1). Further, said petition does not contain any allegation that its taxes were paid on time as R.S. § 47:2110 and R.S. § 47:1998 both require. Thus, Comm-Care stated no cause of action.

Additionally, the failure to plead any constitutionality or due process issue is yet another basis for sustaining the no cause exception. Comm-Care now argues that the Louisiana courts' interpretation of Louisiana law violates due process, but this argument was not made timely below. Consequently, Comm-Care has stated no cause of action which might otherwise exist because the purported due process issue was not pled in the state court. Thus, an independent legal basis for the

decision of the lower courts exists and the due process issue has not been properly placed before this Honorable Court.

CONCLUSION

Petitioner did not timely raise the due process issue. This issue was not pled in the state district court and was not considered by either of the intermediate courts. Further, the procedure of which petitioner complains does provide taxpayers with a clear and certain remedy for any unlawful tax collected. Finally, an independent legal basis supports the decisions of the lower courts. Therefore, the Petition for Writ of Certiorari should be denied.



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